Supreme Court, U.S.
FILED
DEC 2 - 2010
OFFICE OF THE CLERK

No. 10-580

In The
Supreme Court of the United States

KRAFT FOODS GLOBAL, INC.,
OSCAR MAYER FOODS DIVISION,

Petitioner,

v.

JEFF SPOERLE, NICK LEE, KATHI SMITH, JASON KNUDSON, On Behalf of Themselves and All Others Who Consent to Become Plaintiffs and Similarly-Situated Employees,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICI CURIAE* OF AMERICAN MEAT INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MEAT ASSOCIATION AND NATIONAL TURKEY FEDERATION IN SUPPORT OF PETITIONER

BRIAN WEGG BULGER
Counsel of Record
JOSEPH E. TILSON
MECKLER BULGER TILSON
MARICK & PEARSON LLP
Suite 1800
123 North Wacker Drive
Chicago, IL 60606
(312) 474-7900
brian.bulger@mbtlaw.com

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 5

SUMMARY OF ARGUMENT 5

ARGUMENT 7

REASONS FOR GRANTING THE PETITION 7

A. The Decision Below Interferes With Collectively-Bargained Agreements And With Long-Established Customs And Practices Of *Amici* Members And Their Represented Workers, And Thus Poses A Question Of National Importance Warranting Certiorari 7

B. The Decision Below Conflicts With The Tenets Of Congress And This Court That National Labor Policy Should Be Uniform, And Multiple Grounds Exist For Federal Preemption Of The State Law At Issue 12

1. The Protection And Enforcement Of Collective Bargaining Rights Under The NLRA And Section 301 Of LMRA Require Preemption 12

TABLE OF CONTENTS – Continued

Page

2. The *Garmon* and *Machinists* Doctrines Of Preemption Also Support Reversing The Decision Below Which Permits Actual Conflict With Federal Labor Law 17

C. The FLSA Preempts State Law Because Congress Designed Section 203(o) To Protect Parties' Choices Made Through Collective Bargaining 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Allen v. McWane, Inc., 593 F.3d 449 (5th Cir. 2010) 23

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 6, 15, 16, 24

Anderson v. Cagle's, Inc., 488 F.3d 945 (11th Cir. 2007) 23

Anderson v. Yungkau, 329 U.S. 482 (1947) 24

Chamber of Commerce v. Brown, 554 U.S. 60 (2008) 20, 21

English v. General Electric Co., 496 U.S. 72 (1990) 13

Franklin v. Kellogg Co., 619 F.3d 604 (6th Cir. 2010) 23

Garner v. Teamsters, 346 U.S. 485 (1953) 18

Hughes Tool Co., 147 N.L.R.B. 1573 (1964) 16

Labor Board v. Katz, 369 U.S. 736 (1962) 9

Machinists v. Wisconsin Emp. Rel. Comm'n, 427 U.S. 132 (1976) 6, 17, 20, 21

Malone v. White Motor Corp., 435 U.S. 497 (1978) 24

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 19

Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967) 19

TABLE OF AUTHORITIES – Continued

Page

Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190 (1983) 13

Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963) 24

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 6, 17, 19, 20

Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209 (4th Cir. 2009) 23

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 6, 13, 14

Texas Co., 78 N.L.R.B. 971 (1948) 16

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 13, 14

U.S. v. Locke, 529 U.S. 89 (2000) 25

Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337 (8th Cir. 1989) 15

Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282 (1986) 18, 19

STATUTORY PROVISIONS

29 U.S.C. §151 12

29 U.S.C. §§157, 158 ..... 4, 6, 9

29 U.S.C. §203(o) ..... *passim*

29 U.S.C. §207(a)(1) 22

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. §218(a) 25

29 U.S.C. §301 ..... *passim*

National Labor Standards Act, Sections 7 and 8 ..... *passim*

Supreme Court Rule 10 5

Supreme Court Rule 37.2 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Elkouri and Elkouri, *How Arbitration Works* (Sixth Edition, 2009, American Bar Association) 9

93 Cong. Rec. 612-17 (1947) 12

93 Cong. Rec. 1023-33 (1947) 12

95 Cong. Rec. 11210 (1949) and App. 75-78 24

U.S. Constitution, Article VI, cl. 2 13

INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae American Meat Institute ("AMI") is the oldest and largest national trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed beef products. *Amicus'* member companies produce more than 95 percent of the meat products available in the United States. *Amicus curiae* National Meat Association ("NMA") is a national trade association that has been advocating the interests of the meat industry since 1946. NMA members include packers, processors, and distributors of meat and meat products. *Amicus curiae* National Turkey Federation ("NTF") is the only national trade association representing the turkey industry exclusively. NTF represents more than 95 percent of the turkey industry in the United States, including breeders, hatchery owners, growers, and processors.

There are more than 526,000 workers employed in the meat and poultry packing and processing industries in the United States. *Amici* members

---

[1] Pursuant to Supreme Court Rule 37.2 the parties have received timely notice of the intent to file and have consented to the filing of this brief *amici curiae*. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici*, made a monetary contribution for the preparation or submission of this brief. Petitioner is a member of *amici*, but has not provided any financial support for this brief, other than its normal dues payments.

contribute to the U.S. Gross Domestic Product in an amount of more than $156 billion.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The manufacturing sector is responsible for over $4.5 trillion in sales each year.

Of the 500,000 plus workers employed by *amici* AMI, NMA and NTF members, about 60% are currently members of unions which represent their interests through collective bargaining. Over 11 million Americans are employed in the manufacturing sector, and over 1.5 million are union-represented. These union workers and their representative unions typically negotiate and execute collective bargaining agreements ("CBAs") for one or more years with *amici* members. Those CBAs govern the wages, hours and working conditions of the represented workers. In some cases, *amici* members and their unions have been parties to CBAs for decades. Many *amici* members and their unions have expressly addressed Clothes-Changing Time issues in CBAs, as did Petitioner here. Other *amici* members and

their unions have addressed Clothes-Changing Time through established customs and past practices under their CBAs.

Amici and their unionized members have a compelling interest in the question presented by this case. *Amici* members already are inundated with Clothes-Changing Time and other wage-hour lawsuits. In many cases, these are "hybrid" actions brought under both state and federal law. As noted, *amici* members have addressed Clothes-Changing Time issues both expressly and implicitly in their CBAs. They have done so in reliance upon Section 203(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §203(o), that reserves to unions and employers the right to negotiate and define in CBAs whether represented workers' Clothes-Changing Time will be compensable under the FLSA, or to achieve the same result through established customs and practices under a CBA. The Seventh Circuit's decision below calls into question, for the first time by a Circuit Court, the long-established express CBA provisions and practices of *amici* members, and their union-represented workers, as to Clothes-Changing Time.

If permitted to stand, the decision below deprives workers and their employers of the benefits struck through collective bargaining on this issue. The decision below also subjects represented workers and their employers to a potential patchwork of state and local laws and ordinances which intrude on their rights guaranteed under Sections 7 and 8 of the

National Labor Relations Act ("NLRA"), 29 U.S.C. §§157, 158, to organize and to bargain collectively over wages, hours and working conditions; Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §301, which provides the mechanism to enforce CBAs, and by Section 203(o) of FLSA, to collectively bargain for inclusion or exclusion of Clothes-Changing Time as compensable time under FLSA. The decision below could destroy the national uniformity of the law of collective bargaining desired by Congress and repeatedly recognized by this Court as appropriate. It also ignores the command of Section 203(o) reserving the issue of FLSA compensability for Clothes-Changing Time to collective bargaining for represented workers. The uncertainty, confusion and undesirable policy contained in the decision below have, and will continue to have, adverse effects on *amici* members and their represented workers by destroying the carefully-crafted compromises and long-established practices on compensability of Clothes-Changing Time contained in their CBAs. Such interference also denies workers and *amici* members the opportunity to freely negotiate, without state or local governmental interference, such compromises in the future. If not checked, state and local interference with this part of the collective bargaining process will likely continue to grow. The Court should act now to prevent such disruption.

Therefore, *amici* respectfully urge this Court to grant the Petition under Supreme Court Rule 10. This truly is a case of first impression as the Seventh Circuit recognized in its decision, Appendix 5 (hereinafter "App."). This is also a case of national importance extending far beyond the concerns of *amici* and their members which should be resolved by this Court as soon as possible.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The decision below interferes with long-established customs, practices and express CBA provisions of *amici* members. If allowed to stand, the decision below will adversely impact the rights of *amici* members, and their represented workers, to bargain and reach agreement on Clothes-Changing Time without state and local regulatory interference. Such a result should not be countenanced by the Court.

The primary purpose of Congress in enacting the National Labor Relations Act was to promote stability in labor relations and reduce the deleterious effects of unregulated combat between unions and employers. The 1947 LMRA amendments to the NLRA provided a CBA enforcement mechanism in Section 301 lacking under NLRA. Congress thus evinced a greater commitment to a uniform national labor policy with

passage of LMRA, as this Court has recognized repeatedly. This Court has often found that the need for such uniformity preempts state and local efforts to impose regulations and limitations impinging upon the process of collective bargaining engaged in by employers and workers and protected by Section 301, LMRA, 29 U.S.C. Section 301, and by Sections 7 and 8 of the NLRA, 29 U.S.C. Sections 157 and 158. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Amici believe multiple bases exist for finding that the state law at issue here is preempted. Specifically, Section 301 of the LMRA, 29 U.S.C. §301, and the doctrine of federal preemption, along with the preemption doctrines established by this Court in *San Diego Building Trades Council v. Garmon*, 395 U.S. 236 (1959), and *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976), all require that the State of Wisconsin's attempt here to interfere with collective bargaining is preempted, and that the decision below should be reversed.

Following controversy and uncertainty over the impact of the FLSA on Clothes-Changing Time issues negotiated by represented workers and employers, in 1949 Congress clarified its position both on the NLRA/LMRA and on the impact of the FLSA upon a specific aspect of collective bargaining with passage of Section 203(o). Section 203(o) mandates a "hands-off" policy *both* under FLSA and NLRA/LMRA when employers and their represented workers negotiate

questions of compensability for Clothes-Changing Time either expressly or through established customs and past practices.

It is inconceivable to *amici* that these Congressional commands were meant to apply *only* to claims for compensation under the FLSA, and not to similar claims under state and local laws. Such a result is, however, precisely what the decision below holds to be the case. The decision below is simply wrong. The need for uniformity of labor policy, and the protection of the rights of collective bargaining in Sections 7 and 8 of the NLRA, together with the specific protection of the particular facet of collective bargaining addressed in Section 203(o) of FLSA, can lead only to the conclusion that Congress meant to preempt collectively-bargained Clothes-Changing Time issues from regulation by state and local authorities.

ARGUMENT

REASONS FOR GRANTING THE PETITION

A. The Decision Below Interferes With Collectively-Bargained Agreements And With Long-Established Customs And Practices Of *Amici* Members And Their Represented Workers, And Thus Poses A Question Of National Importance Warranting Certiorari

Traditionally, *amici* members have relied upon the specific provisions of Section 203(o) to address Clothes-Changing Time either expressly in a CBA, as

did Petitioner here, or through established customs or past practices. Such reliance can hardly be misplaced given the language of Section 203(o):

> *Hours Worked* – In determining for the purposes of Sections 206 and 207 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the *express terms* of *or* by *custom* or *practice under* a bona fide collective bargaining agreement applicable to the particular employee. 29 U.S.C. §203(o) (emphasis added).

In its Statement of the Case, Petitioner recounted how, for more than a quarter-century, Petitioner and its union-represented workers *specifically* addressed the compensability of Clothes-Changing Time through collective bargaining. Petition, 3-4. Petitioner's experience is not unique among *amici* members. Many *amici* member-employers, through collective bargaining, have agreed to extend benefits to represented workers in exchange for removal or limitation of Clothes-Changing Time, and have memorialized those agreements in their CBAs, as did Petitioner.

Other *amici* member-employers have addressed this issue through established customs and operating procedures which do not appear in a CBA. Such implicit handling of the Clothes-Changing Time issue usually is termed an established "past practice."

Established customs and past practices cannot be changed or eliminated unilaterally by a unionized employer *except* through collective bargaining. These customs and practices are also *enforced* under the CBA's arbitration provision when disagreements arise (and may also be enforced through actions under LMRA Section 301, 29 U.S.C. §301). "In certain circumstances, custom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties 'whole' agreement." Elkouri and Elkouri, *How Arbitration Works*, 606 (Sixth Edition, 2009, American Bar Association). An attempt to change past practice and the status quo without bargaining infringes on represented workers' rights under the NLRA, and will be deemed a violation of Sections 8(a)(1) and 8(a)(5) by the employer (interference with employees' Section 7 rights and failure to bargain over wages, hours and working conditions). 29 U.S.C. §§158(a)(1) and (a)(5); *Labor Board v. Katz*, 369 U.S. 736 (1962).

This case presents facts demonstrating an explicit trade between Petitioner and its represented workers. This trade was expressly memorialized in multiple CBAs which conferred extra benefits on employees through negotiations in exchange for elimination of claims for Clothes-Changing Time compensation. Petition, 3-4. The reasons for such an exchange by an employer are obvious and are shared by many *amici* members: the relatively small amount of time spent changing imposes a disproportionate administrative burden on employers to account and pay for such time as compensable time.

Employers are thus willing to confer, through negotiations and past practices, additional benefits in exchange for relief from that administrative burden. Employees are willing to forego this minimal pay in return for more certain and substantial benefits, as happened here.

The exchange may be reflected in a CBA provision, in a side letter of agreement, through a handshake agreement and through the process in which established customs and practices attain the status of "rights" under a CBA. In any of these circumstances, a change by the employer will lead to invocation of the CBA's arbitration provision to permit a third-party construction of the rights of the parties to continuation, change or elimination of compensability for Clothes-Changing Time. Consequently, to the extent represented workers assert a claim for unpaid wages under state or local laws, those claims are dependent upon analysis of the terms of the CBA.

Amici members often operate across a number of states and municipalities. These members historically have often engaged in a form of "pattern" bargaining. In those cases, either a single CBA or multiple, virtually identical contracts will apply across many states, cities and operations. Compensability of Clothes-Changing Time will be expressly determined through CBA language in some cases; in other cases the issue is resolved through custom and practice under the CBA. In either situation, permitting state and local governments to legislate Clothes-Changing Time deprives the parties of the benefits they agreed upon

through collective bargaining, and interferes with the process of collective bargaining itself.

To permit a shifting landscape of local laws on this issue interferes with existing agreements and will disrupt future negotiations. It runs the risk of treating similarly situated workers differently depending on location. It also adds tremendous complexity and expense to bargaining and destroys reasonable efforts at multi-state uniformity by *amici* members and their union-represented workers. Moreover, if such local legislation is not checked now, it will grow and add to the already heavy litigation and compliance burdens of *amici* members.

At a bare minimum, the decision below will require further bargaining by Seventh Circuit employers, including the potential for labor strife. It also places such employers at risk for state and local claims for Clothes-Changing Time, despite negotiated CBA provisions or established past practices governing this issue. In reality, the decision below reaches far beyond the Seventh Circuit. Employers who fail to act based on the decision below run great risks of liability under state and local laws outside the Seventh Circuit should the decision below be followed in other circuits. Such disruptions should not be countenanced by the Court, and state and local laws regulating compensability of Clothes-Changing Time should be preempted by federal law protecting collective bargaining of the issue.

B. The Decision Below Conflicts With The Tenets Of Congress And This Court That National Labor Policy Should Be Uniform, And Multiple Grounds Exist For Federal Preemption Of The State Law At Issue

1. The Protection And Enforcement Of Collective Bargaining Rights Under The NLRA And Section 301 Of LMRA Require Preemption

From the inception of the NLRA in 1935, Congress sought to achieve labor peace and stability by enshrining collective bargaining in federal law and establishing a national tribunal, the National Labor Relations Board ("NLRB"), to enforce those national policy objectives. 29 U.S.C. Section 151.

The need for a uniform national labor law was further refined in the Taft-Hartley Amendments to the NLRA, which became the Labor Management Relations Act ("LMRA") in 1947. The Congressional debates confirm the sanctity of collective bargaining, but also demonstrate a desire that a forum and mechanism other than the NLRB be established to enforce CBAs by permitting such actions in state and federal courts. *See* 93 Cong. Rec. 612-17 (1947) (statements of Rep. Hartley); 93 Cong. Rec. 1023-33 (1947) (statements of Sen. Taft). Section 301 was born from that desire and the debates.

It is from this historical background that the multiple doctrines determining that federal labor laws should preempt many state and local labor laws

arise. Of course, preemption doctrines all stem from the Supremacy Clause, which states: "[T]he Laws of the United States . . . shall be the supreme Law of the Land[.]" U.S. Const. Art. VI, cl. 2. Preemption may take various forms including express (when Congress explicitly states federal law preempts state law), field (where Congress has occupied an entire field with legislation) and conflict (state laws preempted because of conflict with federal laws). *See Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983). The doctrines are not rigidly distinct, and cases in one area may aid interpretation in another. *See English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990). Permitting the states to interfere with the collective bargaining process through regulations such as those at issue here can only have an adverse impact upon a uniform national labor policy. This is especially true when the bargaining at issue is over a subject expressly authorized by Congress in Section 203(o).

This Court has held that regardless of whether Section 301 actions are brought in state or federal court, Section 301 itself requires application of federal substantive law fashioned from the policy of the national labor laws. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). Later, the Court again upheld Congress' interest in having uniformity in the law as it applied to CBAs by rejecting a theory that state courts remained free to apply individualized local rules under Section 301 in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962):

> The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.
>
> More important, the subject matter of § 301(a) "is peculiarly one that calls for uniform law." . . .
>
> * * *
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Id., 103-104 (citations omitted).

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court further broadened the scope of Section 301 preemption, holding that not only claims alleging breach of collective-bargaining agreements, but also claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties" preempt state law. *Id.*, 220; *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1342 (8th Cir. 1989) (citing *Lueck*). The need for such a rule is based on the need for uniformity in labor policy, and this is true even if Congress has not completely occupied the field.

> If the policies that animate §301 are to be given their proper range, however, the preemptive effect of §301 must extend beyond suits alleging contract violations. . . .
>
> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by

> relabeling their contract claims as claims for tortious breach of contract.

Lueck, 211 (citation omitted).

In order to determine what activities the union and the company agreed to exclude from paid time, and how many minutes the union and company agreed to pay for "hours worked" in donning and doffing activities, the lower court here will necessarily be required to examine the agreement in the CBA. In other words, to determine whether Plaintiffs are owed any unpaid wages under state law requires the lower court to interpret the CBA. Because the state claim here for Clothes-Changing Time requires the interpretation of the CBA between the Petitioner and its union, under well-settled precedent of this Court such a state law claim is preempted by Section 301 of the LMRA.

We recognize that the decision below characterizes the situation here as one in which parties collectively-bargained an agreement contrary to state law. To drive this point home, the decision below crafts an analogy – bargaining away speed limits – and rejects the parties' ability to do so. App. 7. The analogy is inapposite here. Speed limits are not within the purview of collective bargaining, nor would other unlawful activities, such as bargaining the right to discriminate on the basis of race or gender, fall within it. Indeed, such subjects would be deemed illegal subjects of bargaining. *See, e.g., Texas Co.*, 78 N.L.R.B. 971, 981-82 (1948); *Hughes Tool Co.*, 147

N.L.R.B. 1573 (1964). On the other hand, Congress in the NLRA protected bargaining over *wages*, *hours* and *working conditions*. Moreover, Section 203(o) *expanded* that endorsement into the *specific area* addressed through bargaining here: Clothes-Changing Time. This hardly constitutes bargaining about unlawful activity or even an area left to the purview of the states.

Whether addressed expressly in a CBA, as here, or through past practice and custom, Clothes-Changing Time issues clearly arise under and as part of CBAs. These issues can be arbitrated under CBA provisions. And their requirements can be *enforced* either by the National Labor Relations Board or through actions under Section 301. It is thus clear that, regardless whether Clothes-Changing Time is expressly defined in a CBA or is implicitly handled through past practice, any state law purporting to regulate such time is "inextricably intertwined" with a CBA which has been agreed to by the parties.

2. The *Garmon* and *Machinists* Doctrines Of Preemption Also Support Reversing The Decision Below Which Permits Actual Conflict With Federal Labor Law

Recognizing that the lines of preemption doctrines can be blurry, *amici* submit that the doctrines of *Garmon* and *Machinists* preemption add weight to the arguments supporting preemption addressed above. Although Congress may not have completely

occupied the field of labor law, this Court has defined, generally quite broadly, the extent of that occupation through its decisions. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." So, too, here Wisconsin's attempt should yield because it interferes with the protected Section 7 right to bargain, and with the Section 8 scheme to enforce those rights. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

In yet another case arising out of an attempt by Wisconsin to intrude on federal labor policy, *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the Court said:

> It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or *arguably* protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," *Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953), the *Garmon* rule prevents States not

> only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 U.S., at 247. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict on overt policy." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971).

Id., 286 (emphasis added).

Such conflict, between Wisconsin's attempt here to regulate long-standing CBA agreements and the right to collectively bargain Clothes-Changing Time, is just what NLRA and Section 203(o) preempt. In its broadest sense, the state law directly conflicts with the rights to bargain protected by Congress. It certainly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Cf., Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 240 (1967). Even in a narrow sense, by imposing a "remedy" on the parties through a state law claim permitting monetary recoveries, the state injects itself directly into a specific area of collective bargaining which Congress expressly protected from such intrusion. If the Court is going to implement the will of Congress set out in the NLRA and Section

203(o), collective bargaining of Clothes-Changing Time is at a minimum, "arguably protected," and thus well within the scope of *Garmon* preemption.

This Court also has held preemption necessary to implement federal labor policy where, *inter alia*, Congress intended particular conduct to "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 140 (1976) (citation and footnote omitted). That is precisely and expressly what Congress did when it enacted Section 203(o), reserving Clothes-Changing Time issues to collective bargaining for represented employees and employers.

By expressly permitting the collective bargaining of Clothes-Changing Time in Section 203(o), Congress has stated its intention to allow the free market forces of such collective bargaining to operate exclusively in this narrowly-delimited area. Wisconsin's intrusion and economic regulation of Clothes-Changing Time ignores Congress' intent that this issue was to be dealt with exclusively through collective bargaining at unionized workplaces. As such, *Machinists* preemption also comes into play to compel reversal of the decision below and a grant of the Petition.

Chamber of Commerce v. Brown, 554 U.S. 60 (2008), is instructive in this regard. In *Brown*, California prohibited employers who received state funds from using such funds "to assist, promote or deter

union organizing." The Court held this law preempted under the *Machinists* doctrine. The Court noted that:

> *Machinists* preemption is based on the premise that "Congress struck a balance of protection, prohibition and laissez-faire in respect to union organization, collective bargaining and labor disputes."

Id., 65 (citations omitted). The Court noted the NLRA's express provisions regarding free speech in union organizing:

> The explicit direction to leave non-coercive speech unregulated makes this case easier, in at least one respect, than previous NLRA cases because it does not require us "to decipher the presumed intent of Congress in the face of that body's steadfast silence."

Id., 68 (citations omitted).

The Court went on to find that California's policy judgment on employer speech was "unequivocally preempted." *Id.*, 69. Here, Congress has not been steadfastly silent, but has expressly chosen to allow Clothes-Changing Time to the give-and-take of collective bargaining. Wisconsin's attempt here to impose its own views or restrictions upon such bargaining clearly intrudes upon Congress' explicit reservation of this issue to be determined through "the free play of economic forces," underlying the *Machinists* preemption doctrine. The Court cannot permit such an intrusion in contravention of Congress' will.

C. The FLSA Preempts State Law Because Congress Designed Section 203(o) To Protect Parties' Choices Made Through Collective Bargaining

The FLSA requires that employees be paid overtime compensation for "hours worked" in excess of 40 per week at a rate not less than one and one-half times the regular rate at which they are employed. 29 U.S.C. §207(a)(1). Under Section 203(o), time spent by employees in pre- and post-shift donning and doffing of clothes is excluded from the computation of hours worked if two conditions are met: first, the activities at issue must constitute "changing clothes" as that term is used in the statute, and, second, a bona fide collective bargaining agreement must exclude, by its express terms or by a custom or practice under the agreement, time spent changing clothes and washing from compensable working time. The first conditional issue of "clothes changing" is not relevant to the Petition here.

The legislative history of Section 203(o) reflects that its passage was part of Congress' ongoing efforts to curtail judicially expansive interpretations of the FLSA. Those efforts commenced with the Portal to Portal Act's passage in 1947, and they were expanded by Congress with enactment of Section 203(o) in 1949. Petitioner ably recounts the legislative history of these laws. *See* Petition, 17-21.

The Fourth, Fifth, Sixth and Eleventh Circuits have cited Section 203(o)'s legislative history to

support holdings that the purpose of this statutory provision is to leave the issue of payment for time spent "changing clothes and washing" to the collective bargaining process. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009), cert. denied, No. 09-1529, 2010 WL 2420333 (Oct. 4, 2010);[2] *Allen v. McWane, Inc.*, 593 F.3d 449 (5th Cir. 2010); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007).

Section 203(o) is a definitional provision that should be construed broadly to preserve and uphold the integrity of the collective bargaining relationship. To avoid giving effect to Section 203(o), the decision below crafts another analogy, stating that Wisconsin is entitled to control the multiplier and multiplicand of time worked and hourly pay in regulating the workweek. (App. 5). As to the mathematical analogy, Congress expressly dealt with the issue by *commanding* in Section 203(o) that the collective bargaining process be respected, including by the states, and it removed from regulatory purview the donning and doffing issue, *so long as*, it was addressed through collective bargaining, as here. Thus, the "right" found in the decision below does not exist.

---

[2] The denial of certiorari in *Sepulveda* bears no relationship to the issue in this case. *Sepulveda* did not address the preemption issue set forth in the Petition, but rather a question of whether "clothes changing" included the donning and doffing of certain types of protective and safety equipment.

Section 203(o) states "there *shall* be excluded any time spent in changing clothes . . . if agreed under a CBA or CBA customs and practice" (emphasis added). This Court has termed "shall" the "language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Certainly this type of language thus imposes a *mandatory* exclusion of bargained Clothes-Changing Time – mandatory both under FLSA and state laws effectuating it. Rep. Herter's use of the bakery industry for illustration in his statement on Section 203(o) referenced in the Petition at 18-19, and seen more fully at App. 75-78, clearly was not meant to limit the reach of the Section only to the bakery industry. So, too, his mention there of interference by Department of Labor representatives with collective bargaining was merely illustrative, and not limited only to the Department or meant to imply permission for such interference by other agencies, courts or states. The clear intent of Congress was to reserve issues of Clothes-Changing Time to collective bargaining whenever possible, and to protect the results of that bargaining from interference by all federal and state regulation. "[T]he question whether a certain state action is pre-empted by federal law is one of Congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Lueck*, *supra*, 208, citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Congress' purpose, and its command for a "hands-off" policy on collective bargaining of Clothes-Changing Time could not be more clear, and thus preemption is proper.

FLSA Section 218(a) does not save the Wisconsin law from preemption. A state law that defines "hours worked" to include time spent in activities covered by Section 203(o) does not shorten the maximum workweek or raise the minimum wage as permitted by Section 218(a). It simply defines which activities constitute "work," a matter not addressed by 218(a), and not "saved" for state interpretation, regulation or change. Thus the state law here does not fall within the parameters of Section 218(a) permitting states to set higher minimum wages and shorter maximum workweeks. Congress did *not* reserve to the states a definition of "hours worked" in Section 218(a), but *did* reserve to collective bargaining the right to define "hours worked" for the limited area of Clothes-Changing Time. The over-expansive reading of the decision below of Section 218(a) does just what the Court cautions against in *U.S. v. Locke*, 529 U.S. 89 (2000). As in *Locke*, this Court should reject the decision below and "decline to give broad effect to [a] saving clause[ ] where doing so would upset the careful regulatory scheme established by federal law." *Id.*, 106.

The Seventh Circuit decision below ignores the clear Congressional purpose to protect collective bargaining over Clothes-Changing Time stated in the express command of Section 203(o). Despite repeated negotiations, an exchange of benefits and express CBA language, the decision below permits Wisconsin law to trump Congress' will as exemplified in the NLRA/LMRA and in Section 203(o). Thus, the decision below permits precisely what Congress forbids –

interference with collective bargaining, and in particular interference with bargaining over Clothes-Changing Time.

CONCLUSION

Amici members already face a deluge of lawsuits under the FLSA alleging various violations. In some cases, these suits have been brought due to changes in regulatory interpretations previously relied upon. Here, however, the decision below not only threatens long-established CBAs and bargaining relationships, it does so in the face of an express command by Conress that employers and their represented workers be left alone to resolve Clothes-Changing Time issues through collective bargaining. The decision below flies in the face of Congress' "hands-off" instruction contained in Section 203(o), as well as intruding into the sphere of collective bargaining generally protected by the NLRA and by LMRA Section 301. The decision below adds to the already-heavy FLSA litigation burdens of *amici* members, disrupts existing CBAs and future negotiations, and exposes *amici* members to the shifting kaleidoscope of state and local regulations from which Congress sought to protect them. In such circumstances, *amici curiae*, the American Meat Institute, National Association of Manufacturers, National Meat Association and National Turkey Federation, respectfully request the Court

grant the Petition and issue a writ of certiorari on the question presented.

Respectfully submitted,

BRIAN WEGG BULGER
Counsel of Record
JOSEPH E. TILSON
MECKLER BULGER TILSON
MARICK & PEARSON LLP
Suite 1800
123 North Wacker Drive
Chicago, IL 60606
(312) 474-7900
brian.bulger@mbtlaw.com

Attorneys for Amici Curiae

Dated: December 2, 2010